**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| HENDRIX MORENO MONTECASTRO,<br><br>Plaintiff,<br><br>v.<br><br>NEWSOM, *et al.*,<br><br>Defendants. | Case No.: 1:20-cv-00689-SAB (PC)<br><br>ORDER DIRECTING CLERK OF COURT TO RANDOMLY ASSIGN A DISTRICT JUDGE TO THIS ACTION<br><br>FINDINGS AND RECOMMENDATIONS RECOMMENDING DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE, FAILURE TO COMPLY WITH A COURT ORDER, AND FAILURE TO STATE A COGNIZABLE CLAIM FOR RELIEF<br><br>(ECF Nos. 6, 7) |

Plaintiff Hendrix Moreno Montecastro is proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

## I.

## BACKGROUND

Plaintiff filed the instant action on May 18, 2020. (ECF No. 1.)

On August 25, 2020, the Court screened Plaintiff's complaint, found no cognizable claims, and granted Plaintiff leave to file an amended complaint within thirty days. (ECF No. 6.) However, Plaintiff did not file an amended complaint or otherwise communicate with the Court. Therefore, on

October 14, 2020, the Court issued an order for Plaintiff to show cause within fourteen days why the action should not be dismissed for failure to prosecute, failure to comply with a court order, and failure to state a cognizable claim for relief. (ECF No. 7.) Plaintiff has not responded to the order to show cause and the time to do so has passed. Accordingly, dismissal of the action is warranted.

## II.

## SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fail[] to state a claim on which relief may be granted," or that "seek[] monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated in the deprivation of Plaintiff's rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

Prisoners proceeding *pro se* in civil rights actions are entitled to have their pleadings liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff's claims must be facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The "sheer possibility that a defendant has acted unlawfully" is not sufficient, and "facts that are 'merely consistent with' a defendant's liability" falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

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## III.

## COMPLAINT ALLEGATIONS

Over the course of the past two decades a history of serious danger, overcrowding, and an excessive increase in violence has emerged in the State of California Prisons. A large part of this epidemic is prisoner double bunking which is the primary source of all obstacles that manifest through overcrowding living conditions, such as: (1) treacherous living conditions as imminent danger (from overcrowding), as inmates beat, attack and even kill each other living space; (2) noise levels so profound that inmates consider committing suicide, fight, riot, attack, and suffer mental infliction; (3) double bunking inmates, creates invasions of space, constant disturbance, shaking, movements that trigger hostility, anger, fights, riots, attacks, suicide, killings, and murders. It is also mental, emotional, stress and anxiety, profound depression and psychological pain and suffering for long periods of time; (4) double bunking inmates is the sole reason or prison and jail overcrowding. In fact the State of California are overcrowded based on double bunking inmates vertically; (5) double bunking manifests overcrowding, which in turn creates lack of adequate medical care and mental health for prison inmates due to the sheer volume of population, where under qualified medical staff cannot meet the medical and mental health needs of the whole population; (6) double bunking of inmates creates unsafe living conditions, where prison order cannot be maintained by the correctional officers in California. Because of the overcrowding, officials rely on having "shot caller" inmates regulate other inmates for disciplinary purposes, such as beating inmates, attacking inmates, bullying inmates, using duress and fear, murder and killings; and (7) double bunking inmates in California creates overcrowding and causes a serious and significant increase in violence.

Prison inmates, mainly lifer and long sentence inmates, are more prone to violence and are the ones that mostly trigger major fights, attacks, riots and manifest a dangerous atmosphere for the entire population.

One of the main points in inmate to inmate violence is directly related to top bunk inmates that get up and down the bunk constantly, shaking the bunk (waking up bottom bunk inmate) movements that disturbs the inmate on the bottom, moving and shaking the bunk from the top, that causes coffee, food and things to drop and spill. This frustrates inmates because it is never ending. It also causes

lack of living space, where two inmates occupy the same space at the same time, this is the number one cause of violence.

Inmates on the top bunks tend to get up and down a lot, they jump down for food, water, to use the restroom, to look in their lockers, to move around, and the nonstop movement that overwhelms the bottom bunk inmate.

The top bunks are hazardous because there are no ladders to climb up the bunk. There are no adequate handholds or rails to grip for going up and jumping down from the top bunk. The only way inmates can get up a bunk is to step on a small foot hold on the end of the bunk which is slippery and small and for only one foot. Another way is to stand on top of the bottom bunk and climb up that way. Inmate wars result from standing on the bottom bunk. While the inmate is trying to get on the top bunk, the bunk is shaking, moving, and creates a frustration to the inmate on the bottom. When the top bunk inmate jumps down (all inmates must leap-jump off the top bunk, that is the only way down), which creates a loud sound and annoys the bottom bunk inmate and surrounding inmates. This process is every single day, all day and night.

While the top bunk inmate tries to get down, there are no hand-rails, handholds, ladder or foothold that can be reached. To get down the inmate must fully commit to the jump and hope he lands right or he suffers injury. Eighty percent of inmates report they had a top bunk injury.

Over seventy-five percent of the inmate population has made medical requests for bottom bunk chronos due to injuries or problems getting up and down the top bunk. Seventy-five percent of the above inmates are systematically denied bottom bunk chronos who are forced despite their problem or medical injuries. The denials are systematic because of overcrowding and there are not enough bottom bunks.

Jumping down from a bunk can and usually does cause medical problems to the bones, feet, hips, knees, ankles, and back. Because of the process of getting up and down the top bunks without handholds inmates also suffer injuries to their hands, elbows, and shoulders, especially inmates over the age of 40.

Governor Newsom and Diaz have a practice of clearing the top bunks of an institution, and shifting inmates from prison to prison or suspend in transit while the federal court special master

performs population counts, counting only the inmates on bottom bunks, because the top bunk inmates are shifted or suspended. After the count is performed, the inmates are then immediately filled back into the top bunks, while the next prison for inspection does the same.

It is evidenced by the California Department of Corrections and Rehabilitation (CDCR) policy to clear the top bunks for inspections and counts, that top bunk inmates are the cause of overcrowding and CDCR and Governor Newsom realize it and that is why they shift and suspend only top bunk inmates.

On August 30, 2018, all the top bunks were vacant at the California Correctional Institution, and the population was approximately 400 inmates. There was no violence, overcrowding or problems related to any of the above issues, including better medical care and treatment. The officers were telling inmates: "DON'T GET USED TO THIS KIND OF LIVING, SOON EVERYBODY WILL BE BACK, AFTER THE FEDS DO THEIR COUNT, ALL THE TOP BUNKS WILL BE FILLED." Upon hearing the news that the top bunks would all be filed, inmates were complaining, stressing and having anxiety about who would be their cellmate. When the inmate top bunks were filled, the violence, harassment, excessive force, fights, attacks, assaults and inadequate medical care all returned.

Medical facilities at all prisons are underqualified and lack adequate credentials to treat and diagnose most inmates medical conditions. Over seventy percent of the inmate population is denied adequate medical care. Inmates with known medical conditions are denied bottom bunk chronos even if necessary, because CDCR informed medical to top the bottom bunk chronos because there is not enough bunks. Thereby, medical providers ignore the medical needs of thousands of inmates that need bottom bunk status, and are forced to live on top bunks causing pain and suffering.

Inmates in hallways, outside, in cells, in dorms, or anywhere in the facility are excessively loud. When inmates are crowded together, they must speak louder over the other inmates because the noise levels are so high. The officers scream for silence which never works.

There is an underground policy because of the double bunking overcrowding in which officers use excessive force, fear, duress, threats, physical abuse, assault and violence as discipline. Officers

will ransack inmates property to pay for the mishap of another inmate which causes innocent inmates to lose property and suffer punishment for someone else's problems.

Because of double bunk overcrowding, CDCR classification committees deny programs to thousands of inmates that are required to participate in specific programs by the Board of Parole Hearings (BPH). Based on overcrowding it takes months and even years to get into rehabilitative programs to comply with the BPH demands for early release on parole.

Plaintiff seeks declaratory relief and a permanent injunction abolishing all top bunks in the entire State of California.

## IV.

## DISCUSSION

### A. Overcrowding-Double Bunking

Plaintiff contends that double bunking creates unconstitutional crowding in violation of the Eighth Amendment.

"The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishment but also from inhumane conditions of confinement." Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). However, the Eighth Amendment does not "mandate comfortable prisons" that are "free of discomfort." Rhodes v. Chapman, 452 U.S. 337, 349 (1981). "To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Id. at 347. The Eighth Amendment does proscribe the "unnecessary and wanton infliction of pain," which includes those sanctions that are "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976). This includes not only physical torture, but any punishment incompatible with "the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97, 102 (1976) (internal quotations and citations omitted).

To prevail on an Eighth Amendment claim for deprivation of humane conditions of confinement, a prisoner must satisfy two requirements: one objective and one subjective. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Under the objective requirement, the prison official's acts or

omissions must be objectively, sufficiently serious and result in the denial of the minimal civilized measure of life's necessities. Id. (internal citations and quotations omitted). In this regard, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." Id. at 832 (internal quotations and citations omitted).

Under the subjective component, a prison official must have a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834. "[T]hat state of mind is one of 'deliberate indifference' to inmate health or safety." Id. "Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. Conversely, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." Id. at 844. In addition, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

In Rhodes v. Chapman, 452 U.S. 337, 348 (1981), the Supreme Court held that double-celling prison inmates is not a violation of the Eighth Amendment. The inmates in Rhodes v. Chapman filed suit seeking an injunction because "double celling confined cellmates too closely" and caused overcrowding of the prison. Id. at 340. Based on "extensive findings of fact" in the record, the Supreme Court concluded that double celling of inmates did not lead to conditions that violated the Eighth Amendment, such as the unnecessary infliction of pain; a deprivation of "essential food, medical care, or sanitation;" or the creation of "other conditions intolerable for prison confinement." Id. at 348-350.

As an initial matter, the Court notes that the existence of orders to reduce prison overcrowding does not give rise to a claim, as overcrowding, by itself, is not a constitutional violation. Doty v. County of Lassen, 37 F.3d 540, 545 n.1 (9th Cir. 1994); Hoptowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982). Moreover, Plaintiff can only litigate this action on his own behalf, as he lacks standing to assert the constitutional rights of others. See Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir.1982) (stating that a party must assert his own rights, not those of third parties) (citing Duke Power

Co. v. Carolina Envtl Study Group, 438 U.S. 59, 80 (1978) ); Warth v. Seldin, 422 U.S. 490, 499 (1974) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action....' ").

Furthermore, allegations of prison overcrowding alone are insufficient to state a claim under the Eighth Amendment. See Balla v. Idaho State Bd. of Corr., 869 F.2d 461, 471 (9th Cir. 1989); see also Rhodes v. Chapman, 452 U.S. at 348-49 (double-celling of inmates by itself does not inflict unnecessary or wanton pain or constitute grossly disproportionate punishment in violation of Eighth Amendment). An overcrowding claim is cognizable only if the plaintiff alleges that crowding has caused an increase in violence, has reduced the provision of other constitutionally required services, or has reached a level rendering the institution no longer fit for human habitation. See Balla, 869 F.2d at 471; Hoptowit v. Ray, 682 F.2d at 1248-49 (noting that overcrowding itself not Eighth Amendment violation but can lead to specific effects that might violate Constitution), abrogated in part on other grounds by Sandin v. Conner, 515 U.S. 472 (1995).

Plaintiff has failed to allege particularized injuries allegedly stemming from overcrowding, and his allegations about the overcrowding itself are conclusory and insufficient to state a claim. See, e.g., Akao v. Shimoda, 832 F.2d 119, 120 (9th Cir. 1987) (per curiam) (as amended) (reversing district court's dismissal of claim that overcrowding caused increased stress, tension, and communicable disease among inmate population); Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984) (affirming that Eighth Amendment violation may occur as result of overcrowded prison conditions causing increased violence, tension, and psychiatric problems). Specifically, although Plaintiff contends that Governor Newsom and Diaz have a practice of clearing the top bunks of an institution, and shifting inmates from prison to prison or suspend in transit while the federal court special master performs population counts, he fails to state any particularized allegations about how the prison's overcrowding has had a specific impact on him. Indeed, Plaintiff does not explain whether he was in a cell that was over capacity or was deprived of any services because of overcrowding. Therefore, his overcrowding claim fails. See Balla, 869 F.2d at 471; Rounds v. Woodford, No. CIV S-05-0555 GEB

GGH P., 2009 WL 1657462, at *2-3 (E.D. Cal. June 12, 2009) (finding that plaintiff failed to "plead specific facts demonstrating that overcrowding has caused him to be exposed to unhygienic conditions" and that allegations that overcrowding made him feel "stress, tension, and unsafe" were insufficient "for the court to reasonably infer that defendant is liable"); Valdespino v. Brewer, No. CV 13-01528-PHX-DGC (MEA), 2014 WL 1875120, at *5 (D. Ariz. May 9, 2014) (finding that plaintiff did not state overcrowding claim when he "fail[ed] to assert approximately when and for how long he was subjected to overcrowded and understaffed conditions"); see also Latimer v. Kolender, No. 05cv2090 JM(JMA)., 2008 WL 2326305, at *5 (S.D. Cal. June 3, 2008) (noting that "[g]eneralized conclusory allegations of overcrowding ... are insufficient to state a claim").

Nor are Plaintiff's allegations sufficient to indicate that prison officials ignored an obvious risk to his health or safety or that prison officials had knowledge of a substantial risk to plaintiff's health or safety but failed to take reasonable measures to protect plaintiff. In other words, Plaintiff's mere reference to prior incidents of violence in prison is not enough to support an Eighth Amendment claim.

Lastly, to the extent Plaintiff contends that Defendants have failed to remedy overcrowding pursuant to remedial orders issued in the class actions Armstrong and Plata, his claim fails. See Brown v. Plata, 563 U.S. 493 (2011); Armstrong v. Davis, 58 Fed. App'x 695 (9th Cir. 2003). The remedial decrees do not create independent causes of action. "[R]emedial orders ... do not create 'rights, privileges or immunities secured by the Constitution and the laws' of the United States." Hart v. Cambra, No. C-96-0924-SI, 1997 WL 564059, *5 (N.D. Cal. Aug. 22, 1997) (quoting Green v. McKaskle, 788 F.2d 1116, 1123–24 (5th Cir. 1986) ). Thus, Plaintiff is not entitled to relief for the alleged violation of Plata. Further, this Court cannot issue relief to Plaintiff under Armstrong. "[A]ny violations of the remedial plan developed in Armstrong do not provide an independent basis for relief in this court. Violations of the Armstrong Remedial Plan must be addressed *through the procedures provided by that plan.*" Prado v. Swarthout, No. 2:15-cv-1866-WBS-DS-P, 2017 WL 1106007, *10 n.1 (E.D. Cal. Mar. 24, 2017) (emphasis added); see also Crayton v. Terhune, No. C 98-4386-CRB-PR, 2002 WL 31093590, at *4 (N.D. Cal. Sept. 17, 2002). Any alleged violations of the Remedial Plan must be addressed through the procedures provided in Armstrong. See Frost v. Symington, 197

F.3d 348, 358–59 (9th Cir. 1999). Accordingly, Plaintiff also fails to state claim based on the Armstrong remedial decree regarding prison overcrowding.

**B. Inadequate Medical Treatment**

Plaintiff also attributes a lack of medical care and treatment to the overcrowding of the prisons. However, Plaintiff's allegations are conclusory in nature. For instance, Plaintiff alleges "that double bunking inmates manifests a overcrowding crisis, and because of the overcrowding of inmates and lack of adequate medical resources due to the large amount of inmates that resources are exhausted, creating inadequate medical care and mental health is inadequate also." (Compl. at 15.) Plaintiff further alleges that "[i]nmates with known medical conditions are denied bottom bunk chronos even were [sic] it is necessary, because CDCR informed medical to stop the bottom bunk chronos because there is not enough bottom bunks." (Id.) However, Plaintiff fails to allege or demonstrate specific facts as to how the overcrowding by double bunking has led to the lack of medical care for him. More importantly, Plaintiff has failed to show that any prison official disregarded an excessive risk to his health and/or safety by double bunking. Simply stated, Plaintiff does not connect the overcrowding to the failure to provide medical care. Plaintiff's conclusory statements that overcrowding results in deficiencies in health care are insufficient. In addition, Plaintiff failed to plead that a policy or action on the part of CDCR in response to crowding resulted in deliberate indifference. Accordingly, Plaintiff fails to state a cognizable claim for deliberate indifference to a serious medical need.

**C. Excessive Noise**

To the extent Plaintiff is seeking to state a claim based upon the alleged excessive noise due to double bunking, Plaintiff fails to state a cognizable claim.

The Ninth Circuit has held that public conceptions of decency inherent in the Eighth Amendment require that inmates be housed in an environment that, if not quiet, is at least reasonable free of excessive noise. Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996), amended 135 F.3d 1318 (quoting Toussaint v. McCarthy, 597 F.Supp. 1388, 1397, 1410 (N.D. Cal. 1984), aff'd in part, rev'd in part on other grounds, 801 F.2d 1080, 1110 (9th Cir. 1986).

However, for excessive noise to be cognizable under the Eighth Amendment, "it 'must either significantly exceed, or be independent of, the inherent discomforts of confinement.' " Endsley v.

Luna, 750 F. Supp. 2d 1074, 1100 (C.D. Cal. 2010) (quoting Demery v. Arpaio, 378 F.3d 1020, 1030 (9th Cir. 2004)). Here, Plaintiff has not present specific factual allegations to find that the noise level is "excessive." Plaintiff has only broadly alleged "[i]nmates in hall ways, outside, in the cells, in the dorms, or anywhere inmates are allowed to be, are excessively loud, such much [sic] that inmates compete for noise levels[.]" (Compl. at 17.) Plaintiff has not stated how often the noise occurred, nor that it is constant, or the specific impact it has caused on him. Thus, the Court cannot find that the noise is "excessive" and therefore, Plaintiff has not alleged the noise level violates his constitutional rights. Keenan v. Hall, 83 F.3d at 1091. In sum, Plaintiff has not presented sufficient facts to support his assertion that the noise levels constitute punishment, therefore Plaintiff has not sufficiently stated an Eighth Amendment violation.

**D. Retaliation**

"Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). To state a cognizable retaliation claim, Plaintiff must establish a nexus between the retaliatory act and the protected activity. Grenning v. Klemme, 34 F.Supp.3d 1144, 1153 (E.D. Wash. 2014). Mere verbal harassment or abuse does not violate the Constitution and, thus, does not give rise to a claim for relief under 42 U.S.C. § 1983. Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). In addition, threats do not rise to the level of a constitutional violation. Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987).

Although Plaintiff contends that he was retaliated against, he has failed to demonstrate a "but-for" causal nexus between the alleged retaliation and any constitutionally protected activity. Accordingly, Plaintiff fails to state a cognizable retaliation claim.

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**E. Injunctive Relief**

As to Plaintiff's request for the statewide prevention of double bunking, Plaintiff lacks standing to seek such relief on behalf of other prisoners. Mayweathers v. Hickman, No. 05cv713 WQH (CAB), 2008 WL 4206822, at *8 (S.D. Cal. May 16, 2008); see, e.g., Spencer v. Hernandez, No. 08-CV-0416-JM (JMA), 2009 WL 331007, at *8 (S.D. Cal. Feb. 9, 2009) (finding that the inmate plaintiff lacked standing to seek an injunction ordering that cameras be installed "anywhere a corrections officer might be able to 'hurt someone' "). Accordingly, the Court finds that Plaintiff fails to show that he would be entitled to injunctive relief even if he had asserted a viable cause of action.

**F. Declaratory Relief**

Plaintiff seeks a declaratory judgment that his rights were violated. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948). "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985).

In the event that this action reaches trial and the jury returns a verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff's constitutional rights were violated. Accordingly, a declaration that any Defendant violated Plaintiff's constitutional rights is unnecessary.

## V.

## FAILURE TO OBEY COURT ORDER AND FAILURE TO PROSECUTE

Here, the Court screened Plaintiff's second amended complaint, and on August 25, 2020, an order issued providing Plaintiff with the legal standards that applied to his claims, advising him of the deficiencies that needed to be corrected, and granting him leave to file an amended complaint within thirty days. (ECF No. 6.) Plaintiff did not file a third amended complaint or otherwise respond to the Court's August 25, 2020 order. Therefore, on October 14, 2020, the Court ordered Plaintiff to show cause within fourteen (14) days why the action should not be dismissed. (ECF No. 7.) Plaintiff failed to respond to the October 14, 2020 order.

Local Rule 110 provides that "[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions . . . within the inherent power of the Court." The Court has the inherent power to control its docket and may, in the exercise of that power, impose sanctions where appropriate, including dismissal of the action. Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000).

A court may dismiss an action based on a party's failure to prosecute an action, failure to obey a court order, or failure to comply with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order to file an amended complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to comply with local rule requiring pro se plaintiffs to keep court apprised of address); Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply with local rules).

"In determining whether to dismiss an action for lack of prosecution, the district court is required to consider several factors: '(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.' " Carey, 856 F.2d at 1440 (quoting Henderson, 779 F.2d at 1423). These factors guide a court in deciding what to do, and are not conditions that must be met in order for a court to take action. In re Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d 1217, 1226 (9th Cir. 2006) (citation omitted).

In this instance, the public's interest in expeditious resolution of the litigation and the Court's need to manage its docket weigh in favor of dismissal. In re Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d at 1226. Plaintiff was ordered to file an amended complaint and within thirty days of August 25, 2020 and has not done so. Accordingly, the operative pleading is the May 18, 2020 complaint which has been found not to state a cognizable claim. Plaintiff's failure to comply with the order of the Court by filing an amended complaint hinders the Court's ability to move this action towards disposition. This action can proceed no further without Plaintiff's compliance with the order and his failure to comply indicates that Plaintiff does not intend to diligently litigate this action.

Since it appears that Plaintiff does not intend to litigate this action diligently there arises a rebuttable presumption of prejudice to the defendants in this action. In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994). The risk of prejudice to the defendants also weighs in favor of dismissal.

The public policy in favor of deciding cases on their merits is greatly outweighed by the factors in favor of dismissal. It is Plaintiff's responsibility to move this action forward. In order for this action to proceed, Plaintiff is required to file an amended complaint curing the deficiencies in the operative pleading. Despite being ordered to do so, Plaintiff did not file an amended complaint or respond to the order to show cause and this action cannot simply remain idle on the Court's docket, unprosecuted. In this instance, the fourth factor does not outweigh Plaintiff's failure to comply with the Court's orders.

Finally, a court's warning to a party that their failure to obey the court's order will result in dismissal satisfies the "consideration of alternatives" requirement. Ferdik, 963 F.2d at 1262; Malone, 833 F.2d at 132-33; Henderson, 779 F.2d at 1424. The Court's August 25, 2020 order requiring Plaintiff to file an amended complaint expressly stated: "If Plaintiff fails to file an amended complaint in compliance with this order, the Court will recommend to a district judge that this action be dismissed consistent with the reasons stated in this order." (ECF No. 6.) In addition, the Court's October 14, 2020, order to show cause specifically stated: "Plaintiff is warned that failure to comply with this order will result in a recommendation to a district judge that the instant action be dismissed, with prejudice, for failure to prosecute, failure to obey a court order, and failure to state a cognizable claim for relief." (ECF No. 7.) Thus, Plaintiff had adequate warning that dismissal would result from his noncompliance with the Court's order.

## VI.

## ORDER AND RECOMMENDATION

The Court has screened Plaintiff's complaint and found that it fails to state a cognizable claim. Plaintiff has failed to comply with the Court's order to file a first amended complaint or respond to the Court's order to show why the action should not be dismissed. In considering the factors to determine if this action should be dismissed, the Court finds that this action should be dismissed for Plaintiff's failure to state a cognizable claim, failure to obey the August 25, 2020 and October 14, 2020 orders, and failure to prosecute this action.

Accordingly, it is HEREBY ORDERED that the Clerk of Court is directed to randomly assign a Fresno District Judge to this action.

Further, it is HEREBY RECOMMENDED that this action be DISMISSED for Plaintiff's failure to state a claim, failure to comply with a court order, and failure to prosecute.

This Findings and Recommendation is submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen **(14) days** of service of this Recommendation, Plaintiff may file written objections to this findings and recommendation with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The district judge will review the magistrate judge's Findings and Recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **November 3, 2020**

UNITED STATES MAGISTRATE JUDGE